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**Before the
Federal Communications Commission
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
)
Nondiscrimination in the Distribution)
of Interactive Television Services)
Over Cable)

CS Docket No. 01-7

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcasters (“NAB”) submits these reply comments in response to certain comments on the Commission’s *Notice of Inquiry* addressing various issues surrounding the distribution of interactive television (“ITV”) services over cable platforms. NAB urges the Commission to act now to establish a clear policy to prevent cable operators from discriminating among ITV service providers and content.

In this reply, NAB refutes the entirely predictable arguments by the cable industry urging the Commission to close this proceeding without adopting – or even proposing – any ITV-related regulations or policies. As an initial matter, NAB points out that no commenter in this proceeding has disputed that narrowband Internet services have flourished because of an open and nondiscriminatory architecture that promotes innovation and consumer choice. NAB accordingly sees no reason for the governmental policies that insure openness and nondiscrimination to change in the broadband environment. Certainly no commenter in this proceeding has presented a convincing rationale for departing from the regulatory principles that have kept narrowband Internet services competitive, accessible and devoid of entry barriers. The adoption of a general policy preventing cable operators from discriminating among ITV service providers and content would materially advance this goal, and should not, moreover, be regarded as any sort of radical departure from long-standing congressional and Commission policies.

Despite protestations by the cable interests that they have every incentive to provide unaffiliated ITV services and content to consumers, there is in fact no reason to believe that cable operators will refrain from using their control of gatekeeper broadband distribution facilities to the detriment of unaffiliated ITV service and content providers,

other disfavored competitors, and consumers. Certainly cable operators have not hesitated in the past to exercise their gatekeeper power in such a manner, and the development of ITV will only expand opportunities for cable operators to disfavor competing service and content providers. Indeed, NAB and other commenters in this proceeding discussed in detail the myriad of technical and other ways that cable gatekeepers can block, interfere with, or degrade the ITV enhancements associated with the interactive programming of unaffiliated entities or other disfavored competitors.

As NAB anticipated in its initial comments, the cable interests predictably argued that the Commission's adoption of any nondiscrimination standard (or any other regulation applicable to ITV) would deter investment in and delay the deployment of ITV distribution facilities and services. Regardless of the Commission's actions relating to ITV, cable operators will in fact continue upgrading their distribution systems to offer a variety of highly remunerative services, including cable modem service, digital cable, pay-per-view services and video-on-demand. Indeed, substantial investments in cable broadband facilities have already been made, and would be unaffected by any regulation of ITV at this juncture. Moreover, a number of studies examining the question of whether the Commission should require access to cable broadband platforms by unaffiliated Internet Service Providers ("ISPs") have refuted the cable industry's claims that an open access requirement for ISPs would have a deleterious effect on investment in and deployment of broadband infrastructure. The Commission has also rejected on a number of occasions arguments by telephone companies that regulatory requirements (including those relating to access to closed networks) would seriously reduce investment incentives. The Commission should reach a similar conclusion in the ITV context.

Finally, the Commission should be skeptical of the cable industry's assertion that, just because cable is a speech-related industry, then any economic-oriented regulation affecting that industry must automatically be treated as a speech-based restriction meriting raised First Amendment scrutiny. Certainly a policy preventing cable operators from discriminating among ITV service and content providers would have a lesser impact on speech than the previously-upheld must-carry rules, and would not warrant the same heightened level of First Amendment scrutiny.

In sum, no arguments have been presented that should dissuade the Commission from acting to promote the availability of choice in ITV services and content for consumers. The Commission should therefore proceed quickly to propose rules barring discrimination in the provision of ITV services.

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TO: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits this reply in response to certain comments on the Commission’s *Notice of Inquiry* in this proceeding.² In the *Notice*, the Commission sought comment on various issues surrounding the distribution of interactive television (“ITV”) services over cable platforms, particularly the need to prohibit at least vertically integrated cable operators from discriminating among ITV service providers.

In this reply, NAB refutes the entirely predictable arguments by cable interests urging the Commission to close this proceeding without adopting – or even proposing – any ITV-related regulations or policies. As a general matter, NAB notes that no commenter disputed that narrowband Internet services have flourished because of the open and nondiscriminatory nature of the narrowband network’s architecture. NAB accordingly urges the Commission to act to insure that broadband services, including ITV, remain similarly competitive, accessible and

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *Notice of Inquiry* in CS Docket No. 01-7, FCC 01-15 (rel. Jan. 18, 2001) (“*Notice*”).

devoid of entry barriers. The adoption of a general policy preventing cable operators from discriminating among ITV service providers and content would materially advance this goal, and should not, moreover, be regarded as any sort of radical departure from long-standing congressional and Commission policies. Despite protestations by cable operators that they have every incentive to provide unaffiliated ITV programming to consumers, there is in fact no reason to believe that cable operators will refrain from using their control of gatekeeper broadband distribution facilities to the detriment of unaffiliated ITV content providers, other disfavored competitors, and consumers. Indeed, the growth of ITV will actually *expand* opportunities for cable gatekeepers to disadvantage unaffiliated service and content providers, including broadcasters.

As NAB anticipated in its initial comments, the cable interests repeated their familiar argument that any type of regulation applicable to them would discourage investment in broadband distribution facilities and/or new services. The Commission should reject these arguments in the ITV context for the same reasons that commenters, economists and other experts previously cited in the context of proposed Internet open access requirements, and that the Commission itself relied on when rejecting similar arguments by telephone companies. The Commission should also reject the overly familiar argument that any sort of regulation applicable to the cable industry automatically raises serious First Amendment concerns. In sum, no arguments have been presented that should dissuade the Commission from acting to (1) promote the availability of choice in ITV services and content for consumers, and (2) provide reasonable access to consumers for ITV providers unaffiliated with the cable operators controlling the distribution platform.

I. The Commission Should Act Now To Insure That The Principles Of Openness And Nondiscrimination That Have Allowed Narrowband Internet Services To Flourish Continue To Govern The Development Of Services In The Broadband Environment.

As discussed in NAB's initial comments (at 3-5), narrowband Internet services have flourished because of an "end-to-end" architecture that is open and nondiscriminatory and that, consequently, promotes innovation and consumer choice. No commenter disputed that openness and nondiscrimination played a vital role in creating the Internet's innovative environment. It was, moreover, governmental policy intervention, not "unregulation," that forced the telephone companies to provide open, nondiscriminatory access to their networks, thereby producing the tremendous innovation boom in narrowband Internet services.³

Given the remarkable growth and success of narrowband Internet services, NAB sees no reason for governmental policy insuring openness and nondiscrimination to change in the broadband environment.⁴ Certainly no commenter in this proceeding has presented a convincing

³ See, e.g., L. Lessig, *Innovation, Regulation, and the Internet*, The American Prospect Online at 5 (March 27-April 10, 2000) ("FCC has made possible the extraordinary innovation that the Internet has produced" by "keeping the [telephone] network neutral" and "open"); T.R. Roycroft, Ph.D., *Tangled Web: The Internet and Broadband Open Access Policy* at 1-5, The Public Policy Institute AARP (January 2001) (the transition in the U.S. from a telephone monopoly to the competitive environment of the Internet depended on regulatory policies by Congress and the Commission requiring open access, which spurred competition and innovation); F. Bar, *et al.*, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm* at 1, 3, 7-8, E-conomy Working Paper 12 (August 1999) (all the innovations of the Internet era were possible because the FCC prevented the telephone companies from dictating the architecture of data networks and because regulatory policy forced open access to telephone networks whose owners tried to keep closed); F. Bar, *et al.*, *Access and Innovation Policy for the Third-Generation Internet* at 490, Telecommunications Policy 24 (2000) (previous cycles of Internet innovation "largely owed their success to the network's open architecture, a result of consistent FCC policy over the past 30 years").

⁴ See, e.g., Lessig, *Innovation, Regulation, and the Internet* at 6 (the principles of openness and neutrality distinguishing the narrowband Internet from earlier, less successful networks "should guide us in choosing rules to govern networks in the future"; at the least, "the burden should be on those who would compromise" these principles "to show that it will not take away from the innovation we have seen so far"); Roycroft, *Tangled Web* at 28-29 (FCC needs to extend principles of open access applicable to narrowband Internet to broadband so as to encourage

rationale for departing from regulatory principles that have kept narrowband Internet services competitive, accessible and devoid of entry barriers. For ITV and other broadband services to flourish as narrowband Internet services have done, the Commission therefore similarly needs to insure that consumers have nondiscriminatory access to the ITV providers and content of their choice, rather than merely the ITV services favored by the cable company that controls the distribution network. In sum, the Commission must recognize that refraining from acting to insure nondiscrimination in the provision of broadband services including ITV would not only constitute a “fundamental policy reversal” (Bar, *et al.*, *Defending the Internet Revolution* at 3), but could also “fatally undermine” the openness that spurred the innovation in narrowband Internet services.⁵

In addition, a clear signal from the Commission on applying general principles of nondiscrimination to ITV and other broadband services would not be premature.⁶ Indeed, as NAB discussed in detail in its initial comments (at 5-8), it would be far preferable to establish the basic principle of nondiscrimination now while the broadband networks generally and the ITV market specifically are still developing, rather than waiting to intervene after anti-competitive

competition and innovation); Bar, *et al.*, *Access and Innovation Policy* at 497 (the “successful policy trend of the past 30 years has been to force competition and assure open access to the incumbent infrastructure,” and that successful policy should not now be reversed); Bar, *et al.*, *Defending the Internet Revolution* at 30 (“[r]eversing the set of policy innovations that have led to broad American communications leadership would be unwise, at best”).

⁵ *Upgrading the Internet*, The Economist Technology Quarterly at 36 (March 24, 2001) (“The demise of the end-to-end principles that have served the Internet so well would be a tragedy Were that to happen, the last decade of the 20th century might come to be seen as an all-too-brief golden age of openness and innovation”).

⁶ *But see, e.g.*, Comments of National Cable Television Association (“NCTA”) at 7-14; AOL Time Warner Inc. at 3-8 (contending that ITV services were still in a nascent stage and any regulation would be premature).

networks and market structures and access-limiting technology have become entrenched.⁷ The Commission should look with a particularly skeptical eye to claims by the cable industry that any FCC actions (or even proposals) with regard to ITV would be premature, given the opinion by a number of industry observers that cable companies' interests and practices pose the most serious threat to the openness of the broadband architecture.⁸ Establishing nondiscrimination standards now would also allow broadband providers to construct or upgrade their systems to be consistent with the principles of openness and competitiveness, and would encourage the more rapid development of innovative ITV services by providers confident in their ability to reach consumers "free of any potential disruption or discrimination" by cable gatekeepers.⁹

⁷ See also Bar, *et al.*, *Access and Innovation Policy* at 492 (FCC urged to address broadband open access issues now because "decisions made now will profoundly shape the future trajectory" of the rapidly developing broadband system); Bar, *et al.*, *Defending the Internet Revolution* at 5 ("[p]ost-hoc solutions will not compensate for a less than optimal market development" of the broadband Internet system); Roycroft, *Tangled Web* at 28 (although technologies "are constantly evolving," the "basic policy question[s]" concerning Internet access and consumer choice "will remain intact").

⁸ See, e.g., Roycroft, *Tangled Web* at vi ("Cable companies, because they control broadband Internet access facilities and high-speed data networks, as well as sources of Internet content, have the greatest potential to interfere with the openness of the Internet structure and to reduce the benefits that have been generated by the open architecture of the Internet."); Bar, *et al.*, *Access and Innovation Policy* at 497 ("one provider, the monopoly cable franchise, with significant market power," is "in a position to prevent open access" to broadband Internet); L. Lessig, *Cable Blackmail*, *The Industry Standard* (Nov. 14, 1999) (stating that the cable system for providing broadband Internet "is being designed" to limit competition and restrict consumer choice, even though "[c]able networks can be designed to be open just as phone networks are"); Bar, *et al.*, *Defending the Internet Revolution* at 10-11, 24 (study discusses cable's market power and the "damaging consequences" of "[c]able control of broadband access to the Internet").

⁹ *The Future of the Interactive Television Services Marketplace: What Can the Consumer Expect?*, Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Committee (Sept. 27, 2000) (statement of Representative Rick Boucher) ("*Interactive TV Hearing*"). Recent studies also indicate that most consumers understand what ITV is and want it now. See *Communications Daily* at 9 (April 4, 2001) (citing study by Boyd Consulting).

II. Despite Their Protestations To The Contrary, Cable Interests Have Not Hesitated In The Past To Exercise Their Gatekeeper Position To The Detriment Of Unaffiliated Entities And Other Competitors, And The Development Of ITV Will Only Expand Opportunities For Cable Gatekeepers To Disadvantage Competing Service And Content Providers.

As discussed in detail in NAB's initial comments (at 11-12), Commission action promoting the availability of consumer choice and reasonable access for all ITV providers to the distribution platform controlled by cable operators would be entirely consistent with the congressional goals expressed in the 1996 Telecommunications Act and the 1992 Cable Act. The Commission has also frequently documented cable's dominant position in the multichannel video programming distribution ("MVPD") market.¹⁰ Promotion of competition and consumer choice in the ITV market would, as NAB explained in its initial comments (at 12-15), accordingly be consistent with the Commission's long-standing goals of promoting competition to wired cable in the MVPD marketplace, and preventing the leveraging of cable's existing market power into new markets, such as ITV. In sum, FCC action now adopting a general nondiscrimination policy for ITV services would not represent any sort of radical departure from established congressional and Commission policy in dealing with cable operators possessing gatekeeper power.¹¹

¹⁰ See, e.g., *Seventh Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1 at ¶¶ 5, 9 (rel. Jan. 8, 2001) ("*Cable Competition Report*").

¹¹ See also *Memorandum Opinion and Order* in CS Docket No. 00-30, FCC 01-12 (rel. Jan. 22, 2001) ("*AOL/TW Order*") (in approving AOL and Time Warner merger, FCC adopted open access requirements with regard to Internet services offered by unaffiliated Internet Service Providers ("ISPs"), and declined to impose additional conditions on the merger concerning ITV because the Federal Trade Commission had already imposed nondiscrimination conditions concerning interactive content); *Communications Daily* at 3 (April 5, 2001) (at April 4th hearing on cable competition, Senate Antitrust Subcommittee criticized cable operators for raising prices much faster than general inflation rates and for withholding local sports and other popular programming from DBS and cable overbuilders).

Indeed, as other commenters noted as well,¹² the development of ITV will only expand opportunities for cable gatekeepers to disadvantage competing service and content providers. For example, in the interactive environment, a cable operator will be able to disadvantage the programming of competitors (such as broadcast programming) by blocking, interfering with or degrading the ITV enhancements associated with that programming. If a consumer may select among a number of programs with interactive features, but the distributor has used its gatekeeper position to degrade technically or otherwise interfere with the ITV enhancements associated with certain of those programs, the consumer will be more likely to choose the non-degraded interactive programming. In this manner, cable operators could easily discriminate against the ITV-enhanced programming of unaffiliated entities or other disfavored competitors such as broadcasters.

More specifically, the development of ITV will allow cable operators to exploit their gatekeeper position by disfavoring in a myriad of ways the programming and services offered by unaffiliated entities and other competitors. For example, cable system operators appear increasingly likely to control the television “portal” on digital, interactive cable systems.¹³ Exercising control over the portal can only enhance the market power of cable operators in the digital environment, as well as their ability to favor affiliated programming and services. Cable operators will, for instance, be able to use the portal screen to, *inter alia*, “offer customer service, promote programming, market their brand, run interactive ads or sell goods,” and operators

¹² See Comments of Association of Local Television Stations, Inc. (“ALTV”) at 9-11 (explaining how ITV provides additional incentive and ability for MVPDs to discriminate).

¹³ C. Leddy, *TV Portal Picture Becomes More Clear*, Multichannel News at 48 (April 23, 2001). This portal will function like a home page, and will provide an on-screen menu of applications for viewers to access with a remote, including an electronic program guide, the Web, electronic mail, video-on-demand or television commerce.

would also like to use the portal as the “power-on screen” (*i.e.*, the screen that appears when viewers first turn on their television sets). Leddy, *TV Portal Picture* at 48. In addition, as noted by NAB in previous submissions to the Commission, cable gatekeepers may discriminate against ITV service providers in a variety of technology-related matters, such as electronic program guides (“EPGs”), screen displays, channel assignment and positioning, caching of information, and downstream and return path bandwidth and transmission speed.¹⁴

NAB accordingly agrees with the Non-MVPD Owned Programming Networks that the Commission should establish nondiscriminatory quality of service requirements that apply throughout the ITV distribution system. *See* Comments of Non-MVPD Owned Programming Networks at 17-20. Because cable operators “could take actions to constrain the ‘quality’ (*e.g.*, transmission speed or reliability)” of either “upstream requests sent by subscribers in response” to interactive triggers or the “downstream transmission” of ITV-enhanced content (*Notice* at ¶ 32), nondiscrimination standards specifically couched in terms of quality of service are needed to insure that consumers’ access to the ITV content of their choice remains unhindered. NAB reemphasizes that nondiscrimination standards must be made applicable to two-way ITV services requiring a return path and to those services, such as EPGs, not requiring a return path.¹⁵

¹⁴ *See* NAB Letter to FCC Chairman William E. Kennard, CS Docket No. 00-30 at 3 (May 19, 2000). In our initial comments in this proceeding (at 24-29), NAB explained how cable operators in the digital environment will be able to engage in significant discriminatory conduct through their control of EPGs alone.

¹⁵ *See* Comments of NAB at 21-22 (given the importance of EPGs in the digital environment, ITV must be defined to include interactive services, such as EPGs, that do not require a return path, and, in defining ITV, the FCC should distinguish between one-way, or “reactive,” and two-way, or “transactional,” ITV services).

Cable interests, however, dispute the “presumption” in the *Notice* that cable operators have the incentive to discriminate against unaffiliated ITV content or other competitors.¹⁶ NAB strongly believes that the *Notice*’s “presumption” is more than warranted, as “every network owner in history,” including cable network owners, has acted to “control access” and “minimize competition.” Lessig, *Innovation, Regulation, and the Internet* at 5.

In disputing the *Notice*’s “presumption,” the cable interests contend, *inter alia*, that cable operators have every incentive to carry as broad an array of ITV services and content (both affiliated and unaffiliated) as possible in order not to lose customers to rivals. *See, e.g.*, Comments of AT&T at 27. Cable operators do, of course, have “an incentive to offer an attractive package of programs to consumers,” but they also have “an incentive to favor [their] affiliated programmers,” and “where the two forces are in conflict,” operators “may, as a rational profit-maximizer, compromise the consumers’ interests.” *Time Warner Entertainment Co. v. U.S.*, 211 F.3d 1313, 1322 (D.C. Cir. 2000). The capability and the incentive of cable operators to favor affiliated programming and services – and to disfavor unaffiliated content and services – have also been expressly recognized by Congress and the Commission.¹⁷ Indeed, it has even been recognized that cable systems have “systemic reasons” for discriminating against

¹⁶ Comments of AT&T Corp. at 27. *See also* Comments of NCTA at 34 (there is no “reason to believe” that, even if cable facilities were the only ones suitable for interactive services, “cable operators would deny the use of such facilities to a competitor”).

¹⁷ *See, e.g.*, Section 2(a)(5) of 1992 Cable Act, note following 47 U.S.C. § 521 (Congress found that “cable operators have the incentive and ability to favor their affiliated programmers,” thereby making “it more difficult for noncable-affiliated programmers to secure carriage on cable systems”); *AOL/TW Order* at ¶¶ 86, 217 (FCC recognized consumer harm likely to result from the ability and incentive of the combined AOL and Time Warner to discriminate against unaffiliated ISPs on its cable network and against unaffiliated video programming networks in the provision of ITV services); *Cable Competition Report* at ¶¶ 172-75 (cable industry remains highly vertically integrated, with one or more of the top five cable MSOs holding ownership interests in 99 programming services, and these vertical relationships “may deter competitive entry in the video marketplace and/or limit the diversity of programming”).

competitors, particularly broadcasters, regardless of the existence of any vertical relationships because “cable has little interest in assisting, through carriage, a competing medium of communication.”¹⁸

Despite the protestations of the cable interests in this proceeding to the contrary, cable operators will clearly have “little interest in assisting, through carriage” (especially on anything approaching a nondiscriminatory basis) the “competing” interactive services and content offered by broadcasters and other competitors. *Turner Broadcasting*, 520 U.S. at 201. Certainly cable operators have been unwilling to allow unaffiliated ISPs access to their broadband systems and reluctant to permit their customers to choose among competing ISPs.¹⁹ Cable operators’ behavior in this regard has in fact been entirely consistent with the behavior exhibited by network owners historically, who never want to open their networks to other content and service providers (particularly unaffiliated ones).²⁰ In sum, there is no reason to believe that cable

¹⁸ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 201-202 (1997) (explaining that cable systems have the incentive to disadvantage broadcast competitors “in favor of programmers – even *unaffiliated* ones – less likely to compete with them for audience and advertisers”) (emphasis added). See also Section 2(a)(15) of 1992 Cable Act, note following 47 U.S.C. § 521 (“A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.”).

¹⁹ See, e.g., *Cable Competition Report* at ¶ 49 and n. 166 (unlike high-speed Internet access offered through a telephone company where the customer can freely select an ISP, the cable ISP “is selected by the cable provider,” and “most cable operators offer only one ISP to customers”; moreover, “[m]ost cable providers hold interest[s] in the chosen ISP and also provide proprietary content to that ISP”); Jerome H. Saltzer, “*Open Access*” is Just the Tip of the Iceberg (Oct. 22, 1999) at <http://mit.edu/Saltzer/www/publications/openaccess.html> (describing a number of examples of gatekeeping already reported by the customers of cable companies providing Internet access).

²⁰ See, e.g., Bar, et al., *Access and Innovation Policy* at 495 (in surveying government policy toward telephone networks since 1960’s, study observes that “owners of the communications

operators will suddenly “see the light” and allow their customers to select, on a nondiscriminatory basis, among competing providers of broadband services, including ITV. Indeed, other commenters have pointed out that the market power of cable system operators – and their incentive and ability to discriminate against unaffiliated entities – has grown due to increased consolidation, including the merger of cable operators with ISPs. *See, e.g.,* Comments of ALTV at 6-9.

Talking about the “very low barriers to entry to become an ITV player” (Comments of AT&T at 10) is, moreover, no response to the problems presented by cable’s position as a “physical and economic” bottleneck into consumers’ homes. *Time Warner*, 211 F.3d at 1321. While it may be that content providers can develop ITV applications for relatively little cost, that content still must be distributed to consumers through the broadband facilities owned by cable gatekeepers. Given the “little interest” of cable operators in “assisting” competing content and service providers “through carriage,” *Turner Broadcasting*, 520 U.S. at 201, and the ability of

infrastructure strongly resisted opening their network to other service providers”); Bar, *et al.*, *Defending the Internet Revolution* at 7-9 (in discussing how government policy forced owners of the “basic phone network” to open their networks to new service and content providers, thereby leading to the success of the Internet, this study describes how AT&T for decades “resolutely” resisted “regulatory requirements to allow interconnection with its network”); L. Lessig, *Will AOL Own Everything?* Time at 106 (June 19, 2000) (“we have never seen the owners of a large-scale network voluntarily choose to keep it open” and “we should not expect” owners of broadband networks to act any differently); L. Lessig, *The Cable Debate, Part II*, The Industry Standard (Nov. 14, 1999) (noting that, when competitors suggested AT&T open up its telephone networks, AT&T argued that telephone competition could not work, just like cable operators now argue that designing cable networks to allow multiple ISPs cannot work); *Upgrading the Internet* at 33-34 (because many broadband providers offer content to their subscribers, broadband “providers have no incentive to supply rapid access to competing providers’ content,” and because broadband providers generally “own the physical connections into their subscribers’ homes,” they are “in a position to place limits on the kinds of services that can be provided over their connections”); *The Slow Progress of Fast Wires*, The Economist at 57-59 (Feb. 17, 2001) (article describing how British Telecom is refusing to cooperate in the unbundling of local loops, thereby delaying the arrival of DSL service, the British government’s attempt to speed broadband deployment, and the efforts of other parties to offer broadband services to consumers).

cable operators to prevent “subscribers from obtaining access to programming” they “choose[] to exclude,”²¹ the relatively modest cost or ease of production of some ITV applications will not result in their gaining access to distribution or becoming available to consumers.

Clearly, to prevent cable owners from operating their broadband distribution systems in a closed, discriminatory fashion, thereby restricting consumer choice and inhibiting innovation in ITV and other broadband services, the Commission should establish nondiscrimination standards applicable to all cable operators making ITV services available to consumers.²² Only by addressing these issues in a timely manner will the Commission insure that consumers enjoy nondiscriminatory access to the ITV providers and content of their choice and, ultimately, that the ITV market develops to its fullest potential.

III. Preventing Cable Operators From Discriminating Among ITV Service And Content Providers Will Not Discourage Investment In Broadband Distribution Facilities Or New ITV Services.

As NAB anticipated in its initial comments (at 8-9), the cable interests predictably argued that the FCC’s adoption of any nondiscrimination standard – or indeed any regulation applied to ITV – would deter investment in and delay the deployment of ITV distribution facilities and services. *See, e.g.*, Comments of NCTA at 28-36; AT&T at 31-34. NAB urges the Commission to reject this overly familiar argument in the ITV context for the same reasons that were previously identified in the context of proposed Internet open access requirements, and that the Commission itself relied on when rejecting similar arguments by local exchange carriers.

²¹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994) (the cable operator, “by virtue of its ownership of the essential pathway” into a subscriber’s home, can, “unlike speakers in other media . . . silence the voice of competing speakers with a mere flick of the switch”).

²² Thus, we agree with the Commission that any nondiscrimination rule would not be triggered unless a cable operator voluntarily chose to offer ITV services to its subscribers. *Notice* at ¶¶ 21, 33.

Indeed, as discussed in detail below, cable operators cannot realistically afford not to invest in broadband facilities, regardless of the Commission's regulatory actions concerning ITV.

A. Regardless of the Commission's Regulation of ITV, Cable Operators Will Continue Upgrading Their Distribution Systems to Offer a Variety of Services.

Whether or not the Commission ultimately determines to establish a nondiscrimination policy for ITV access, cable operators will continue upgrading their distribution facilities so as to be able to provide a variety of services, including cable modem service, digital cable, pay-per-view services, and video-on-demand.²³ In fact, a report by the cable industry itself stated that the provision of digital video (with "massive increases in the amount of programming" that can be delivered) is a primary impetus behind the upgrading of cable distribution facilities. W.S. Ciciora, *Cable Television in the U.S.* at 47, Cable Television Laboratories, Inc. (1995). The adoption of nondiscrimination standards, or other policies relating to ITV, will certainly not cause cable operators to forego the tremendous business and growth opportunities presented by the myriad of broadband services, of which ITV is only one.²⁴ Indeed, if cable operators are truly as concerned about competition from Direct Broadcast Satellite as they frequently assert, then they will have every incentive to upgrade their distribution facilities and provide new

²³ See, e.g., Roycroft, *Tangled Web* at 23 (cable operators upgrade their networks to offer a variety of services, including Internet and voice); J.K. MacKie-Mason, *Investment in Cable Broadband Infrastructure: Open Access Is Not an Obstacle* at 12 (Univ. of Michigan, Nov. 5, 1999) ("*Investment Study*") (study explains that cable operators are upgrading their facilities and making investments in broadband to offer Internet access service and non-Internet services, including digital TV and telephony, and noting that cable MSOs specifically mention "increased video channel capacity as one of the reasons" for system upgrades).

²⁴ In fact, the FCC itself has noted that cable operators "continue to develop and deploy advanced technologies, especially digital compression techniques, to increase the capacities and to enhance the capabilities of their transmission systems," so as to be able to "deliver additional video options and other services (e.g., data access, telephony) to their subscribers." *Cable Competition Report* at ¶ 205.

broadband services (including ITV) to maintain their preeminent position in the MVPD marketplace, as well as to prevent loss of market share for high speed Internet access to providers of Digital Subscriber Line (“DSL”) service.²⁵ The Commission’s adoption of nondiscrimination standards for ITV will not in any way eviscerate these economic incentives for investment in broadband facilities.²⁶

Beyond cable’s economic incentives to invest in upgrading their distribution facilities, NAB moreover notes that considerable investment in broadband infrastructure has already been made. Indeed, a number of cable operators have been obligated by “Social Contracts” with the Commission to upgrade their systems significantly. For example, in 1995, Continental Cablevision, Inc. and Time Warner Cable entered into Social Contracts that resolved pending cable rate complaints against them, required them to provide refunds to subscribers, and obligated them to invest billions of dollars in upgrading their cable systems.²⁷ Because major

²⁵ “Delaying investment in broadband cable facilities, and thereby losing a substantial share of the market [to phone companies offering DSL], is not a sensible strategy for cable operators.” MacKie-Mason, *Investment Study* at 26.

²⁶ NCTA specifically contends that a nondiscrimination requirement will deter cable operators from investing in facilities for the transmission of ITV services, because they would bear all the risk of failure yet have to share the fruits of success with competitors (who could claim regulated access to the cable platform for delivery of their ITV services). *See* Comments of NCTA at 29. As discussed above, cable operators will continue to invest in broadband facilities, regardless of the FCC’s regulatory policies toward ITV, so as to provide a variety of highly remunerative services, including Internet access and pay-per-view. It would make no economic sense whatsoever to forsake the opportunities presented by the myriad of broadband services merely because the FCC determines to require nondiscriminatory treatment of ITV service and content providers.

²⁷ *Memorandum Opinion and Order, Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995) (requiring Time Warner to invest \$4 billion in upgrades, including deployment of fiber optic technology); *Memorandum Opinion and Order, Social Contract for Continental Cablevision*, 11 FCC Rcd 299 (1995), *amended* 11 FCC Rcd 11118 (1996) (as amended, Social Contract required Continental to invest \$1.7 billion in upgrading its cable systems, including deployment of fiber optic technology). Comcast Cable and the FCC entered into a similar Social Contract in 1997, which required most of Comcast’s systems to, *inter alia*, “use addressability or other suitable

cable system operators have been legally bound to invest substantial sums in significantly upgrading their cable systems pursuant to Social Contracts, the Commission has yet another reason to be skeptical of claims by cable operators that regulations pertaining to ITV (or to any other service) will seriously delay the deployment of upgraded cable distribution facilities. As one relevant study of cable investment has observed, a “great deal of investment in cable broadband facilities has already been made, and this sunk investment would not be affected” by requirements for access to the broadband cable infrastructure. MacKie-Mason, *Investment Study* at 8.

B. The Cable Industry’s Claim That Any Regulation Affecting It Will Endanger Investment in Facilities and Services Is Predictable, Repetitive and Unconvincing.

In claiming that regulation applicable to ITV will deter investment in broadband distribution facilities or new ITV services, the cable interests essentially repeat the same arguments they made in the Commission’s proceeding on high-speed access to the Internet over cable facilities.²⁸ Several studies examining the question of whether the Commission should require access to cable broadband platforms by unaffiliated ISPs (so-called “open” access) have specifically addressed the cable industry’s claim that such access policies would deter investment in broadband facilities and delay the deployment of high-speed Internet services. Just as those studies concluded that an open access requirement would not have these deleterious effects on

technology to make *interactive* services available to subscribers.” *Order, Social Contract for Comcast Cable Communications, Inc.*, FCC 97-375 at ¶ 6 (rel. Oct. 10, 1997) (emphasis added).

²⁸ See, e.g., Comments of AT&T in GN Docket No. 00-185 at 66-88 (contending that government-mandated access would harm consumers by deterring investment, impeding innovation, and delaying and impairing the provision of broadband services); Comments of NCTA in GN Docket No. 00-185 at 57-62 (access regulation would impose significant burdens and complexities that will deter investment and innovation); Comments of Charter Communications, Inc. in GN Docket No. 00-185 at 29-31 (government-mandated access regulations would harm investment to the benefit of competitors, not consumers).

investment in and deployment of broadband infrastructure, the Commission in this proceeding should conclude that a nondiscrimination policy for ITV services and content would not adversely affect investment in broadband facilities and development of ITV services.

For example, one thorough study of investment in cable broadband infrastructure concluded that cable companies' threats that an open access requirement would deter them from investing in broadband facilities were "not credible." MacKie-Mason, *Investment Study* at 2. In fact, the detailed economic modeling by the author of this study showed that open access is "likely to increase" last-mile "broadband transport revenues for cable operators." *Id.* at 2, 6.²⁹ Other economists and industry experts have similarly explained that, so long as cable operators are able to charge competitive rates to unaffiliated ISPs for transport, then an "open access" requirement would not eviscerate the incentives for cable operators to invest in broadband infrastructure.³⁰

²⁹ "Broadband last-mile transport revenue" is the payment from ISPs to cable operators for use of the broadband facilities. This payment is generally a fee for each broadband subscriber an ISP serves over the cable companies' facilities. Thus, as various competing ISPs serve more and more customers via the cable operators' facilities, the transport profits for these operators should increase. MacKie-Mason, *Investment Study* at 5. Analysts, including Merrill Lynch and Jupiter Communications, have agreed that open access would provide earnings benefits for cable operators. *Id.* at 29, 35.

³⁰ See, e.g., Comments of America Online, Inc. in CS Docket No. 98-178 at 34-37 and Attachment B (Oct. 29, 1998) (MIT economist opined that cable companies' arguments against a broadband open access requirement did "not make economic sense," and that the cable companies' ability to charge competitive prices for transport over their networks would provide investment incentives for those companies to upgrade their networks); Ex Parte Comments of Professors Mark A. Lemley and Lawrence Lessig, *Application for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251 at 36 (in rejecting cable companies' arguments that open access will retard investment in broadband, commenters contended that these arguments were "simply wrong as a matter of economics" because incentives to build broadband would still exist); Lessig, *Cable Blackmail* (if access fees paid by ISPs are high enough to reward cable for its investment, there is no need to allow cable operators to monopolize broadband facilities as incentive for them to be built); *Broadband Backgrounder: Public Policy Issues Raised by Broadband Technology*, Center for Democracy and Technology at 66 (Dec. 2000) ("Internet access is not the only, or even primary, reason a

Beyond economic studies and the opinions of analysts, the example of broadband investment and deployment in Canada may be instructive. In contrast to the opinion of cable operators in this country, the Canadian Cable Television Association has actually stated that open access “is in the cable companies’ financial interests.” MacKie-Mason, *Investment Study* at 35. In addition, a Canadian government requirement to provide open access, announced in January 1996, has not deterred investment in broadband facilities by Canadian cable operators, and Canada’s largest cable operators, such as Rogers Communications and Shaw Communications, have invested in cable upgrades more rapidly than any of the major U.S. companies. *Id.* at 27-28.³¹

The evidence described above thus demonstrates that a requirement providing ISPs access to the broadband distribution platform controlled by cable operators should not seriously deter investment in or delay deployment of cable broadband infrastructure. Accordingly, “[t]here is no plausible public interest support or economic justification for the claim that investment in broadband facilities may occur only if [cable operators] retain the ability to deal exclusively with their affiliated” ITV service providers “in the provision of last-mile broadband transport.”³² NAB therefore urges the Commission to adopt a policy of nondiscriminatory treatment of ITV service providers and content. Just as the Commission has rejected on a number of occasions arguments by telephone companies that regulatory requirements (including

cable operator would need to upgrade its system, and so long as the operator is able to obtain a fair return on the Internet-specific portion of the upgrade, the upgrade should still make business- and investment-sense”).

³¹ Nor has that announcement deterred investments in Canadian companies subject to this open access requirement. Microsoft, for example, has invested over \$400 million in Rogers Communications. *See Broadband Backgrounder* at 66.

³² Comments of America Online in CS Docket No. 98-178 at 36 (commenting on merger of AT&T and TCI and those companies’ arguments against an open access requirement).

those relating to access to closed networks) would seriously reduce investment incentives, the Commission should similarly reject these arguments by the cable industry in the ITV context.³³

The Commission should also reject claims that a nondiscrimination requirement would discourage cable operators from investing in ITV services and content.³⁴ In essence, the cable interests are contending that the only way for them to earn, on their own ITV services, a profit sufficient to provide the incentive for offering those services would be to have the legal right to exclude all possible competitors from their distribution platform. The Commission must reject this ludicrous argument. As an initial matter, this contention appears inconsistent with other comments asserting that barriers to entry are “particularly low” in the ITV marketplace and that “sophisticated and compelling ITV applications” can be developed at very little cost. Comments of AT&T at 10. More significantly, there is simply no need to extend cable companies’ gatekeeper control over the distribution platform into new markets for broadband services, including ITV, so as to provide adequate investment incentives.³⁵ Indeed, as discussed in NAB’s

³³ For example, throughout its history, AT&T repeatedly argued that opening its network to devices like Carterfone or alternative service providers like MCI would hinder investment. “Regardless of this, regulatory action to introduce competition proceeded and network investment continued.” Bar, *et al.*, *Access and Innovation Policy* at 508. More recently, the FCC has rejected arguments by incumbent local exchange carriers that price regulation of line sharing would reduce their incentives to develop advanced services. See *Third Report and Order* in CC Docket No. 98-147 and *Fourth Report and Order* in CC Docket No. 96-98, 14 FCC Rcd 20912, 20979 (1999). Incumbent local telephone companies continue, moreover, to invest in DSL facilities, even though they are required by law to offer open access. MacKie-Mason, *Investment Study* at 26.

³⁴ See, e.g., Comments of NCTA at 29 (if the provision of interactive services by an affiliate triggers an obligation to carry unaffiliated ITV services on a nondiscriminatory basis, then cable operators will be deterred from investing in ITV services).

³⁵ See, e.g., Comments of Lemley and Lessig in CS Docket No. 99-251 at 36 (refuting argument that “we must grant cable companies not just a monopoly over the wires, but a right to expand that monopoly into competitive markets, in order to give them an incentive to implement broadband services,” which “is simply wrong as a matter of economics”); Comments of America

initial comments (at 13-15), the Commission must, to fulfill the competitive promise of the 1996 Telecommunications Act, prevent “existing monopolies, such as the . . . cable operators,” from “leverag[ing] their current power either to gain an unfair advantage in a competitive market, or to retain their advantage in the local arena.” M.I. Meyerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 Fed. Comm. L.J. 251, 287 (1997).

The further suggestion by the cable interests that unaffiliated ITV service and content providers should simply invest in competing means of distribution to obtain access to consumers is nonsensical.³⁶ As even some cable commenters recognized, many ITV service and content providers may likely be small entities (*see* Comments of AT&T at 8-10) who will not have the resources or time to finance and then wait for the deployment of an entire competing distribution system for ITV services and content. It is also comforting to note that the cable interests are opposing nondiscrimination standards for ITV only because they want to encourage the development of competing means of ITV distribution so they will no longer be forced to endure their gatekeeper status.

Online in CS Docket No. 98-178 at 36 (“a facilities-based service provider” does not need to “capture *supranormal* economic profits” to provide an “incentive to deploy or develop new technology,” and, thus, there is no justification for the claim that broadband investment will occur only if cable operators are allowed “to deal exclusively” with affiliated entities); Lessig, *Cable Blackmail* (claim that cable interests need to extend their monopoly beyond the cable network to include control of “customers” as well in order to have the incentive to invest in broadband is “blackmail,” and suggests a “deep monopoly problem” in the industry); Roycroft, *Tangled Web* at 22 (“a critical economic reason for requiring open access” for ISPs is “to mitigate” the cable operator’s “ability to leverage its access market power into higher levels of the Internet”); Bar, *et al.*, *Access and Innovation Policy* at 507-509 (refuting on a variety of grounds the cable industry’s argument that, “if it cannot impose its affiliated ISP as the exclusive choice for cable broadband access, its network upgrades will be too risky and unprofitable to warrant” the necessary investment).

³⁶ See Comments of NCTA at 29 (contending that no reason would exist for ITV service providers to invest in competing means of distribution for their services if they know they can get regulated access to cable distribution facilities, and this “perversely” would create a cable monopoly by discouraging multiple entry into ITV platform markets).

For all the reasons set forth above, NAB urges the Commission to prevent cable gatekeepers from exercising their control of the “essential pathway” into subscribers’ homes to “silence the voice of competing speakers” in the ITV market. *Turner*, 512 U.S. at 656. To accomplish this goal, the Commission should adopt a clear policy to prevent cable operators from discriminating among ITV service providers and content. Such a nondiscrimination policy will not deter cable operators’ investment in either broadband distribution facilities or in ITV services and will, in fact, encourage the more rapid development of innovative ITV services. If ITV services and content providers are assured of a “clear and uninterrupted path to the ultimate consumer free of any potential disruption or discrimination” by cable gatekeepers, then these entities have greater incentives to invest in and develop new and innovative ITV services. *Interactive TV Hearing*, Statement of Rep. Rick Boucher. Other commenters agreed that assurances of nondiscrimination in the marketplace will promote investment in ITV services and content by unaffiliated providers, who would have greater confidence in their ability to obtain access to consumers through the platforms controlled by cable operators. *See, e.g.*, Comments of ALTV at 3; Non-MVPD Owned Programming Networks at 10.

IV. No Serious First Amendment Concerns Are Raised By A Nondiscrimination Policy For ITV Services And Content.

As an initial matter, NAB notes that the cable industry has a long history of contending that any economic or other regulation affecting it has serious First Amendment implications and, as such, must be subjected to significantly heightened judicial scrutiny. For example, the cable industry challenged, on First Amendment grounds, the regulation of the rates it charged consumers because “regulating cable rates inevitably affects both the content and quantity of speech by limiting the amount of money that a cable operator can spend on programming.” *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996). Taken to its logical

conclusion, the cable industry's argument would mean that virtually *any* regulation affecting the cable industry, such as a minimum wage requirement, should be regarded as implicating speech-related concerns and as necessitating heightened First Amendment scrutiny. After all, if a cable operator is forced by a minimum wage rule to pay higher salaries to some of its employees, then the content and quantity of its speech is limited because the operators will have less money to spend on programming.

The above example illustrates the weakness in the cable industry's position that any type of economic-oriented regulation affecting it automatically entails serious First Amendment concerns. To the contrary, the Supreme Court has made clear that the economic regulation of a communication or speech-related industry does not itself violate the First Amendment, even if a "differential burden" is placed on different types of media.³⁷ Moreover, the Supreme Court has indicated that, in the absence of any suggestion that an economic regulation imposed on a speech-related industry was in fact directed at, or intended to impact, protected speech, then such an economic regulation would not be subjected to any scrutiny greater than would be given to the similar economic regulation of a non-speech industry. *See Leathers*, 499 U.S. at 453 (the "differential taxation of speakers, even members of the press, *does not implicate the First Amendment* unless the tax is directed at, or presents the danger of suppressing, particular ideas") (emphasis added).³⁸

³⁷ *Leathers v. Medlock*, 499 U.S. 439, 452 (1991) (the extension of an existing sales tax to cable television service, while continuing to exempt print media, held not to violate First Amendment).

³⁸ *See also Lorain Journal Co. v. U.S.*, 342 U.S. 143 (1951) (the application of the anti-trust laws to a newspaper that attempted to force its advertisers to boycott a competing radio station was held not to violate any First Amendment freedom, even though the newspaper publisher claimed a right to select its customers and to refuse to accept advertisement from whomever it pleased).

The Commission should accordingly reject the cable industry's assertion that, just because cable is a speech-related industry, then *any* economic-oriented regulation affecting that industry must automatically be treated as a speech-based restriction meriting raised First Amendment scrutiny.³⁹ Because, as discussed in detail above, the "cable operator's bottleneck monopoly is a physical and economic barrier" into "subscribers' homes," *Time Warner*, 211 F.3d at 1321, NAB urges the Commission to consider any ITV nondiscrimination standard as an economic-oriented regulation, which is clearly not "directed at, or present[ing] the danger of suppressing, particular ideas," *Leathers*, 499 U.S. at 453, and which should therefore not receive heightened First Amendment scrutiny.⁴⁰

In any event, it seems clear that a policy preventing cable operators from discriminating among ITV service and content providers would have less impact on the speech of cable operators than the must-carry rules that were upheld in *Turner Broadcasting*, 520 U.S. 180, under an "intermediate" level of review. Those rules required most cable systems to set aside up to one-third of their channels for the carriage of commercial broadcast stations. 47 U.S.C. §

³⁹ See, e.g., Comments of AT&T at 38 ("any regulations" singling out "cable operators for special obligations relative to ITV" triggers "heightened scrutiny under the First Amendment"); NCTA at 49-53 (ITV nondiscrimination requirements would violate cable operators' First Amendment rights).

⁴⁰ The First Amendment implications of an economic regulation affecting a communications industry were also discussed by the Justices of the Supreme Court in oral argument in cases involving the now-eliminated statutory restrictions (formerly contained in 47 U.S.C. § 533(b)) on local telephone companies providing video programming services to subscribers within their service areas. See Transcript of Oral Argument in *U.S., et al. v. Chesapeake and Potomac Telephone Company of Virginia, et al.*; *NCTA v. Bell Atlantic Corp., et al.*, Nos. 94-1893, 94-1900, 1995 U.S. Trans Lexis 107 (Dec. 6, 1995). Several of the Justices questioned departing from "normal rational basis" to a heightened level of First Amendment scrutiny because the restrictions at issue were "classical economic regulation" that "happen[ed] to be economic regulation in an area where people are providing . . . communication services." Unfortunately, the Supreme Court never issued an opinion in these cases because they were mooted by passage of the 1996 Telecommunications Act, which eliminated the challenged restrictions on telephone companies.

534(b)(1)(B). This set aside requirement “reduce[d] the number of channels over which cable operators exercise[d] unfettered control,” and the cable industry claimed that the requirement also “render[ed] it more difficult for cable programmers to compete for carriage on the limited channels remaining.” *Turner*, 512 U.S. at 636-37. In fact, the cable operators complained in *Turner* that, as a consequence of the broadcast carriage requirements, “some cable programmers who would have secured carriage in the absence of must-carry may now be dropped.” *Id.* at 657. Even in light of these claims, the must-carry rules prevailed against a First Amendment challenge.

Despite a specific query from the Commission, the cable interests in this proceeding have *not* represented that there will be a significant physical limitation on the number of ITV services that cable operators will be able to carry over their broadband distribution facilities.⁴¹ If there is no significant physical limitation, then cable operators’ speech would not be restricted by an ITV nondiscrimination requirement, as such a requirement would not force the operators to exclude any ITV service or content that they may want to carry. As described above, the analog must-carry rules require operators to carry specified signals over the limited number of available channels on their cable systems, thereby possibly preventing the carriage of other services (although there was no proof in *Turner* that any such widespread preclusion had actually occurred). In contrast, the application of an ITV nondiscrimination standard will not affect the ability of cable operators to carry whatever ITV services and content they may choose (such as the services of affiliates) over their broadband distribution platforms. Given this significantly lesser impact on the speech of cable operators, the Commission should be skeptical of the cable

⁴¹ See *Notice* at ¶ 53 (inquiring whether there were “capacity restraints limiting cable operators’ ability to accommodate multiple ITV service providers”).

interests' contentions that a nondiscrimination policy for ITV raises serious speech-related concerns meriting the same heightened level of First Amendment scrutiny accorded to rules such as must-carry.⁴²

V. Conclusion

No commenter in this proceeding has disputed that narrowband Internet services have flourished because of an open and nondiscriminatory architecture that promotes innovation and consumer choice. NAB accordingly sees no reason for the governmental policies that insure openness and nondiscrimination to change in the broadband environment. Any departure in the ITV context from the regulatory principles that have kept narrowband Internet services competitive, accessible and devoid of entry barriers appears unwise in the extreme.

As documented by NAB and other commenters in this proceeding, and by Congress and the Commission in a number of other enactments and proceedings, cable interests have not hesitated in the past to exercise their gatekeeper position to the detriment of unaffiliated entities and other disfavored competitors, particularly broadcasters. The development of ITV will only expand opportunities for cable gatekeepers to disadvantage competing service and content providers. Given the myriad of technical and other ways that cable gatekeepers can disfavor the

⁴² NAB further notes that a number of ITV services do not closely resemble the cable services offered by operators subject to the cable television must-carry rules. As the Ninth Circuit Court of Appeals has observed, the “essence of cable service . . . is one-way transmission of programming to subscribers generally.” *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (examining statutory definition of cable services). Certainly “transactional” ITV services involving accessing information from a web site would not appear to fit this definition of cable services, as “Internet access is not one-way and general, but interactive and individual.” *Id.* Indeed, even a “reactive” ITV service – such as a subscriber “drilling down” to access additional information transmitted in the video signal – would seem to be “interactive” and “individual.” Accordingly, NAB questions the opinion of the cable interests (*see* Comments of AT&T at 34-36, NCTA at 41-44) that ITV services are cable services under Title VI of the Communications Act, rather than telecommunications services under Title II. *See id.* at 877 (concluding that cable broadband Internet access was not a cable service but a telecommunications service under the Communications Act).

programming and services offered by unaffiliated entities and other competitors, the Commission must act in a timely manner to insure that consumers enjoy nondiscriminatory access to the ITV providers and content of their choice.

A clear policy to prevent cable operators from discriminating among ITV service providers and content will also not discourage investment in broadband distribution facilities or new ITV services. Regardless of the Commission's actions relating to ITV, cable operators will continue upgrading their distribution systems to offer a variety of highly remunerative services. Indeed, substantial investments in cable broadband facilities have already been made, and would be unaffected by any regulation of ITV at this juncture. Moreover, a number of studies examining the question of whether the Commission should require access to cable broadband platforms by unaffiliated ISPs have refuted the cable industry's claims that an open access requirement would have a deleterious effect on investment in and deployment of broadband infrastructure. The Commission should reach a similar conclusion in the ITV context.

Finally, the Commission should be skeptical of the assertion that the application of any economic-oriented regulation to the cable industry automatically raises serious First Amendment concerns. Certainly a policy preventing cable operators from discriminating among ITV service and content providers would have a lesser impact on speech than the previously-upheld must carry rules, and would not warrant the same heightened level of First Amendment scrutiny.

For all the reasons set forth above, no arguments have been presented that should dissuade the Commission from acting to promote the availability of choice in ITV services and

content for consumers. The Commission should therefore proceed quickly to propose rules barring discrimination in the provision of ITV services.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Jerianne Timmerman", written over a horizontal line.

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

May 11, 2001

CERTIFICATE OF SERVICE

I, Patricia Jones, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 11th day of May, 2001, by first class mail, postage prepaid to the following:

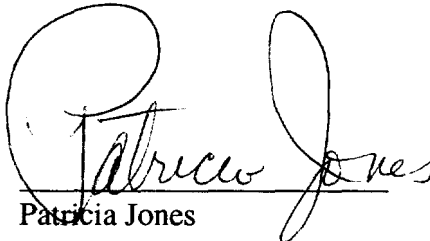
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